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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 636

LOUIS VAN [illegible],

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

LOUIS VON CSEH,

Petitioner.

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on October 13, 1960, 8 N. Y. 2d 1058.

Opinions Below

No opinion was rendered by the Trial Court. An opinion was rendered by the Appellate Division, First Judicial Department, 9 A. D. 2d 660, 191 N. Y. S. 2d 699.

No opinion was rendered by the Court of Appeals of the State of New York, 8 N. Y. 2d 993, 205 N. Y. S. 2d 329. The appendix annexed hereto contains the opinion of the Appellate Division below. A motion to amend the remittitur and for reargument was made in the Court of Appeals. The order on remittitur (Appendix A) was amended (Appendix B).

Jurisdiction

The judgment of the New York State Court of Appeals was pronounced on the 6th day of July, 1960, and on October 13, 1960, the New York State Court of Appeals granted petitioner's application to amend the remittitur (see Appendix) and stated the following: [8 N. Y. 2d 1058, 1059].

> "Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein it was presented and necessarily passed upon and alleged question under the Constitution of the United States, viz.: 'Defendant contended that the right to a speedy trial as guaranteed by the Constitution of the United States was denied to him. The Court of Appeals held that there was no such denial and that there was no substance or merit to defendant's contentions. [See 8 N. Y. 2d 993.]"

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1257 (3).

Questions Presented

The questions presented for review are:

1. Whether petitioner was denied due process when he had been denied a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution.

2. Whether the deprivation of petitioner's right to a speedy trial in the New York Courts is such a fundamental principle of liberty and justice as to come within the due process clause of the Fourteenth Amendment of the United States Constitution.

Procedural History of Case

Petitioner was convicted of 25 crimes of grand larceny in the first degree under Section 1294 of the Penal Law, Consol. Laws, c. 40, and of four crimes of forgery in the second degree under Section 887 of the Penal Law. The Court of General Sessions, New York County, Irwin Davidson, J., rendered judgment, and the defendant appealed.

The Appellate Division modified the judgment of conviction by reversing the larceny counts and dismissed the larceny counts, and affirmed the judgment as modified, and held that larceny convictions could not stand because defendant made use of alleged false representations in course of accomplishing, or in aid of, or in facilitating the theft within meaning of Section 1290-a of the Penal Law, and that even if false pretenses were used in connection with a scheme, which aborted prior to commission of the larcenies alleged, the only material deviation from such scheme was defendant's unilateral ouster of his colleagues, and that thus the false representations constituted an integral part of the embezzlement eventually committed and were adopted by defendant in order to accomplish the crime charged, and that since larceny counts contained no allegations of any false representations, proof of them was inadmissible to sustain the larceny counts, and that evidence sustained convictions under the forgery counts.

Both the People of the State of New York and the defendant appealed to the Court of Appeals.

The People of the State of New York contended in the New York State Court of Appeals that the defendant's convictions of grand larceny were fully supported by competent and legally admissible evidence, and that his conviction of forgery were proper in fact and in law, and that charge

was proper in all respects, and that *defendant's right to a speedy trial was not impaired.* The defendant contended in the Court of Appeals that the Appellate Division correctly reversed and dismissed all of the larceny counts, and that Court of General Sessions erred in admitting evidence of false pretenses in connection with forgery counts, *and that defendant was prejudiced by a denial of his right to a speedy trial.* The order and judgment was affirmed July 8, 1960, without opinion. (*People* v. *Von Csch*, 8 N. Y. 2d 993, 205 N. Y. S. 2d 329.)

Statement of the Case

The petitioner, an American citizen, together with two citizens of India, one Mathur and one Chandrapal Singh, entered into a plan designed to enable them to profit through certain dealings with the provincial governments of two Indian states, Jaipur and East Punjab.

In furtherance of this plan, two corporations were organized in India. The first, called Man Radio & Electricals, Limited (hereinafter referred to as "Radio"), consisted of the aforesaid three incorporators, as well as a number of other stockholders, who invested some $50,000 of capital in the company (557).* The second corporation, called Man Investors, Limited (hereinafter referred to as "Investors"), consisted solely of three people—the defendant, Mathur and Chandrapal Singh (598); Investors had no other officers, directors or stockholders. A contract was then entered into, in India, between these two corporations, whereby Investors became the "managing agent" of Radio (Peo's. Exh. 13; 722). Perusal of this contract establishes

* Figures in parentheses, unless otherwise indicated, refer to folios of the printed Record on Appeal from the judgment of conviction in the New York Court of Appeals.

that a virtual "blank check" was accorded to Investors by Radio. As managing agent, Investors was expressly given literally unlimited powers to do anything at all with the assets and business of Radio, and to bind it to any course of conduct.

Contracts providing for the erection of certain electrical plants and equipment for the governments of Jaipur and East Punjab were then obtained by Radio, apparently through the discreet exertion of influence. The fact that Chandrapal Singh, one of the three principals of Investors, was a cousin of the Maharajah of Jaipur was not without significance in this phase of the operations (608).

Pursuant to the terms of these contracts, Radio was to purchase, transport and erect the requisite machinery for several power plants, in return for specified payments. The greatest portion of the funds required to purchase and ship the machinery to India was supplied by the Jaipur government in advance (632), by establishing letters of credit with the National City Bank. These letters of credit totalled well in excess of a million dollars (1234), and were in favor of Indus International, Inc. (hereinafter referred to as "Indus"), a New York company.

Indus appeared on the scene in the following manner: The defendant Von Cseh was dispatched to New York by his Indian associates with instructions to obtain the services of a purchasing agent in New York (1070). Indus was in the business of acting in that capacity for other Indian concerns, and was apparently qualified to perform the required services. Von Cseh accordingly selected Indus as such purchasing agent.

Indus then proceeded to purchase the necessary equipment, by drawing against the letters of credit; the machinery purchased was sent to India. However, an integral

part of the scheme originally conceived in India by the three principals was that the invoices presented to the bank should be submitted in increased, or padded, amounts, including sums over and above those actually required by the vendors and suppliers of the equipment (1227). The scheme envisioned that the resulting excess funds should redound to the personal benefit of the three men. These plans were never divulged by the plotters to Radio, or its stockholders, or to its officers. Indus, when apprised of the fact that it would be expected to present increased invoices to the bank, did not demur, and proceeded to carry out its assigned part. The bank, presented with the padded invoices, was deceived, and in reliance thereon, made payments to Indus pursuant to the letters of credit, until the available funds were exhausted. The surplus funds, above those actually required to pay suppliers of equipment, continued to accumulate with Indus.

Anticipating the creation of this surplus, Mathur and Chandrapal Singh, on behalf of Investors, forwarded a letter to Indus, authorizing in advance "all the financial arrangements which Mr. Louis Von Cseh makes regarding the amount left over and above the purchase price of the power plant" (815). Pursuant to this authorization from all the other interested parties in Investors, in addition to himself, the defendant wrote to Indus, requesting that such surplus amounts be deposited in the personal joint checking account of the defendant and his wife, maintained in the Bankers Trust Company. These instructions were carried out by Indus, so that ultimately a total of approximately $230,000 was deposited in the personal Von Cseh joint account.

Thereafter, the defendant, from time to time, withdrew portions of these sums from his own account. It is the theory of the prosecution that these withdrawals from his

own account constituted the larcenies with which the defendant was charged (314-5).

At the trial, the defense rested upon the People's case. It was maintained by the defendant that, if any violation of the larceny laws was revealed by the foregoing facts, it could only be the crime of larceny by false pretenses arising from the use of the padded invoices. The vice of the prosecution, according to the defense theory, lay in the fact that no false pretenses whatsoever were alleged in the indictment, and it is clear that, absent such allegations, proof of false pretenses is inadmissible at the trial and prejudicial (Penal Law, §1290-a).

A hint as to why the prosecution felt constrained to adopt the strained and absurd position that it mattered not how the money was originally obtained or from whom, and that any subsequent withdrawal from the defendant's own personal bank account was a larceny by him from the corporation, is found in the fact that the statute of limitations had clearly run as to the crime of obtaining money by false pretenses, but by harking back only to the more recent time when the defendant withdrew the money from his account, a period within the statute of limitations could be arrived at. This position, however, leads to the manifest absurdity that the wrongful scheme of the defendant and his associates to pad bills and invoices, and keep the "overages" for themselves, was legal, while the later withdrawal of the excess funds from the defendant's own account, where they were in the complete control and dominion of the defendant, pursuant to specific written authorization from the duly appointed corporate managing agent, could be a larceny from Radio. Yet this was the People's position (314-5, 320, 324, 325).

The type of "larceny" described above accounts for most of the counts of the indictment. These were all dismissed

by the Appellate Division. A few final counts deal with alleged forgery, and with uttering of a forged document. The trial court committed serious errors, affecting each of these forgery convictions, and accordingly, we contend, reversal of all the remaining counts should be ordered by this Court.

A motion to dismiss the indictment for being deprived of a speedy trial was made by petitioner and denied with leave to renew (256-264). The application was renewed on May 22, 1957 (303-305) but was denied by the trial court. The issue of denial of a speedy trial was adequately preserved in all appellate courts.

The foregoing brief recital of the evidence and motion are designed merely as a frame of reference for the contentions which follow. There is little need to dispute the facts since the real dispute arises as to the legal consequences of the facts shown. As to these, the trial and appellate courts ruled erroneously.

Reasons for Granting Certiorari

The defendant was prejudiced by a denial of his right to a speedy trial in violation of the Sixth Amendment and Fourteenth Amendment of United States Constitution.

The indictment, relating to transactions that occurred in 1948 and 1949, was returned on October 15, 1953 (66). The defendant pleaded not guilty on October 19, 1953 (67). It was not until the very end of May 1957, 43 months after the indictment was returned and more than 91 months after the alleged transactions occurred, that the trial was commenced.

The only serious argument which the People urge as to why this indictment should not be dismissed for failure to

grant the defendant a speedy trial, was that the defendant *once* sought a reasonable delay in the prosecution of the trial.

Where a defendant has once sought an adjournment, the courts have sometimes held that he may be deemed to have waived his right to protest against a later delay in the trial of his case. The question here presented is whether this is a cast-iron rule, of which the prosecution may avail itself to the prejudice of a defendant regardless of what equities may appear, or whether the court will exercise its discretion to prevent this generally valid rule from becoming a tool of injustice.

In this case, seven days after the indictment was returned, and only three days after the defendant pleaded not guilty, the prosecution moved to bring the defendant to trial. In view of the complicated nature of the case, which involved a 31-count indictment, the defense had no alternative but to seek one reasonable delay for preparation. Thereafter, the defense acted in every way to seek an early trial. On November 13, 1953, within 29 days from the return of the indictment, the defendant moved for a bill of particulars, which was granted in part. On April 20, 1954 the defense moved for an inspection of the grand jury minutes, which was denied. At the time the prosecution first moved to bring the defendant to trial, on October 22, 1953, two important witnesses from India were present in New York, having come here to testify before the grand jury. In order to prevent any inconvenience to the People, or to these witnesses, the defense went so far as to agree that the testimony of these Indian witnesses, then present in New York, should be taken conditionally. Accordingly their testimony was taken on November 9, 10, 12 and 17, 1953 (69-73). Thereafter the taking of their testimony was discontinued

on motion of the prosecution as it developed that the prosecutor would be unable to complete the examination.

Throughout the history of the case the defendant moved expeditiously. He repeatedly asked for trial, vigorously protesting each of the repeated adjournments after October 22, 1953. In April, 1956 the defendant moved in the alternative either to dismiss for lack of prosecution, or to compel a speedy trial. The prosecutor had repeatedly stated in court that he was ready to proceed except for the fact that Mathur, a witness, was in India. Nothing prevented the witness Mathur from appearing except his own desires. The reason for Mathur's failure to appear was clearly brought out at the trial on cross-examination, wherein he admitted that he had been making efforts to obtain a money settlement from the defendant. In fact; as stated, there was a civil lawsuit pending against the defendant in the Supreme Court, New York County (3051). The suit was dismissed.

In denying the defendant's motion for a dismissal for lack of prosecution or to compel a speedy trial, Judge McCullen, of General Sessions Court, New York County, noting the prosecution's delay, wrote as follows (261-4):

> "On April 11, 1956 the defendant moved to reduce his bail, in as much as he had been under indictment for a period of more than two years, had continuously resided in this City, was ready to proceed to trial, and was waiting for the District Attorney to produce the necessary witness. Since the District Attorney was not then ready, the bail was reduced to $1500. The District Attorney stated in Court at that time that he expected to have his witness in New York in October and would be ready to proceed to trial at that time. Come October 1956, the District Attorney stated he was not then ready

because his witness was not in New York and stated he is in receipt of the communication from that witness to the effect that he does not expect to be in New York until April 1957.

"The District Attorney states the indictment by which this defendant is charged with specific crimes is a meritorious one and should proceed to trial. I appreciate the difficulty the District Attorney is having with his witness who is not in this country. However, the rights of the plaintiff [*sic*] must also be protected. This motion is denied with leave to renew on or about April 10, 1957. If the case does not then proceed to trial, the indictment should be dismissed. I make this qualified latter statement for the reason that I will not be a Judge of the Court of General Sessions beyond January 1, 1957 and I believe I have no right to bind any other Judge of this Court in his judicial endeavors."

In April 1957, the case again appeared on the trial calendar. Despite Judge McCullen's order, and over defendant's vigorous objections, another judge in the part granted another adjournment (2912). The trial was not commenced until the end of May, 1957, almost four years after the indictment was returned. We submit that these adjournments and the late trial flew in the face of Judge McCullen's finding that any delay after April 10, 1957, would be an inordinately lengthy and prejudicial one, and should require a dismissal of the indictment. A motion for dismissal on this ground was made at the outset of the trial (303-7).

In *People* v. *Prosser* (1955), 309 N. Y. 353, the New York Court of Appeals set forth the reasons underlying the basic right to a speedy trial and concisely stated the rule as follows (p. 357):

"It is clear, then that Prosser was entitled to a speedy trial, and it is equally clear that he did not receive

one. Although what amounts to an undue delay is 'not fixed by the statute in days or months', depending as it does 'upon the circumstances of each particular case' (cit. cases), it may not seriously be urged that the six-year lag in the present case was consistent with the mandate for a speedy trial."

We submit that in the instant case, as in the *Prosser* case, it "may not seriously be urged" that the "lag" was "consistent with the mandate for a speedy trial." The defendant here was not brought to trial until 43 months after the indictment was returned. In the following cases the indictment was dismissed, pursuant to Section 668, upon the ground that the defendants were deprived of their right to a speedy trial.

People v. *Chirieleison* (1957), 3 N. Y. 2d 70. Robbery, grand larceny; 5 years between indictment and trial;

People v. *Schwartz* (4th Dep't, 1958), 6 App. Div. 2d 459. Robbery; 43 months between indictment and trial;

People v. *Setura* (Co. Ct. Queens Co., 1958), 12 Misc. 2d 279. Grand larceny; 38 months between indictment and arraignment;

People v. *Roberts* (Co. Ct. Kings Co., 1958), 11 Misc. 2d 957. Robbery, assault, grand larceny; 23 months between indictment and arraignment;

People v. *Exter* (Co. Ct. Queens Co., 1956), 4 Misc. 2d 651. Robbery, assault, grand larceny; 18 months for 1 defendant, and 26 months for 2 other defendants, between indictment and arraignment;

People v. *Goldman* (Co. Ct. Nassau Co., 1960), 204 N. Y. S. 2d 770. A 6 months delay in bringing defendant to trial, between indictment and arraignment.

People v. *Wilson*, decided November 30, 1960, by New York State Court of Appeals, not reported to date except in Law Report News, *infra;* reversing 200 N. Y. S. 2d 792, 10 A. D. 2d 297. Sixth Amendment to United States Constitution now restricts powers of state courts.

There is no requirement that a defendant make any showing of prejudice, in order to assert his constitutional right to a speedy trial. Thus in *People* v. *Winter* (Ct. Gen. Sess., N. Y. Co., 1958), 182 N. Y. S. 2d 254 (not officially reported), the People claimed that the defendants had failed to establish that they had been prejudiced by the delay. The Court held, however, that the defendants were not required to show prejudice (p. 267):

> "Moreover, a defendant is not required to show prejudice (Petition of Provoo, D. C., 17 F. R. D. 183, 198, affirmed 350 U. S. 857 . . .), and, in fact, the element of prejudice is presumed from the excessive delay (People v. Prosser, supra); and see also Harris v. Municipal Court, . . . 285 P. 699, where it was stated: 'Furthermore, it is not necessary that the party accused affirmatively show prejudice. Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed.'"

The petitioner here did everything in his power to seek a speedy trial, but even this action is well beyond any burden which rests upon a defendant. A defendant has no duty to come forward and seek a speedy trial in order to avail himself of his constitutional privilege. Thus in *People* v. *Serio* (Co. Ct. Erie Co., 1958), 13 Misc. 2d 973, the defendant was imprisoned in California and not available for arrest and trial and the time he was indicted for grand larceny in October 1946. The defendant later returned to Buffalo and resided there openly up to the date of his arrest in

1958. Judge Burke considered the question was whether the defendant had a duty to announce his readiness for trial to the District Attorney, and held that the defendant was entitled to have the indictment dismissed since there was no duty during the period in which he was in the City of Buffalo to announce his availability, and his failure to do so could not be deemed a waiver of his right to a speedy trial.

Where the delay in trial exceeds the period contemplated by Section 668 the defendant is automatically entitled to a dismissal unless the People are able to show "good cause" for the delay. Thus in *People* v. *Mudra* (Co. Ct. Queen Co. 1958), 12 Misc. 2d. 438, the court held that the period of delay of not quite 14 months was sufficient to entitle the defendant to a dismissal and that it would not indulge any presumption that the delay was for a good cause (p. 439):

> " . . . where it exceeds the period contemplated by the statute the defendant is entitled to a dismissal 'unless good cause to the contrary be shown'. . . . There is no presumption that it was for good cause. . . . The burden of proving such cause—and thus, that the delay was not 'undue'—is on the prosecution. (*People* v. *Prosser*, *supra*, p. 358. . . .) It is presumed that the defendant was prejudiced by the delay. . . . Consequently, the delay in this case entitled defendant to a dismissal of the indictment."

Similarly, in *People* v. *Wilson* (2d Dep't. 1957), 5 App. Div. 2d 690, an appeal from a conviction of appellant upon his plea of guilty of attempted robbery in the third degree, the court dismissed the indictment, holding that the People had failed to sustain "its burden of showing good cause" for a delay of 21 months between the filing of the indictment and appellant's arraignment.

The only possible justification available to the district attorney for the unreasonable and lengthy delay herein is that two of his witnesses were not present in New York from 1954 to 1957. The courts have held such excuse to be insufficient. Thus in *People* v. *Phillips* (Sup. Ct., Suffolk Co., 1958), 14 Misc. 2d 565, the Court stated:

> "The prosecutor's ability to bring Phillips to trial depends entirely upon the availability of both Casino and Updike, neither of whom are presently at his disposal. Casino is seriously ill and there is no indication when, if ever, he may be permitted to testify. Updike is beyond the jurisdiction of the court . . .
>
> ". . . Where, as in this case, after a lapse of nineteen months following the indictment the court is firmly of the opinion that the totality of the evidence establishes that the requirement for a speedy trial cannot be fulfilled, it becomes the solemn duty of the court to dismiss such indictment. Although it is a well established maxim of law that the presumption of innocence is with all defendants, up until verdict is rendered, nevertheless it is universally recognized that an outstanding indictment constitutes a cloud on a person's reputation and very existence. . . . It would be cruel and inhuman and in clear violation of a defendant's rights to permit the indictment to stand under all circumstances herein enumerated. Adherence to the principle of law here announced transcends the issue of any particular defendant's guilt or the disposition of any particular case."

Assuredly the defendant here has been denied his right to a speedy trial. The real question presented is whether having once sought a reasonable delay in the trial, the defendant has waived his right. Concededly this is the general rule, but we submit that the court is not without dis-

cretion in its application. Here the defendant sought a reasonable delay only 7 days after the indictment was returned and a mere three days after he had pleaded to the indictment. From that time onward the defendant moved expeditously, from January 7, 1955 onward the defendant repeatedly requested for trial and vigorously protested each adjournment. But it was not until May, 1958 that the trial was commenced.

The logical basis for a rule that a defendant waives his right by having himself sought an adjournment, is that a defendant may not complain of a delay where he has been a party to its cause. However, no defendant may be considered a party to a four year delay where he had only once sought an adjournment, in order to make necessary and prompt motions to prepare his defense.

That the defendant, on one occasion, immediately after the indictment was returned consented to—or even requested—a reasonable adjournment, cannot, we submit, forever bar him from asserting such a fundamental and basic right. So to hold would be to permit the prosecution of a criminal case to lie dormant for an inordinate length of time, with all the consequent vices so forcefully condemned in the *Prosser* case, merely because the prosecution, possessed of all the facts after an indictment, had moved with unnecessary, or unseemly haste, for purely tactical reasons, to try a defendant not prepared for trial. At the most, it seems such a request by a defendant should toll the period of such adjournment and drop it out of the calculation of what is a total, unreasonable delay. As the Court of Appeals of New York has noted, each case must depend upon its own facts (*People* v. *Prosser*, *supra*, 309 N. Y. 353, at p. 360). Judge McCullen, we submit, held that under the facts of the instant case, *a delay just April 10, 1957* would be unconscionable, and that holding is the law of this case.

People v. *Winter* (Gen. Sess. N. Y. Co., 1958), 182 N. Y. S. 2d 254 (not officially reported), involved three indictments. The first indictment, involving conspiracy, was found on July 27, 1954. The arraignment was on July 29, 1954. The second indictment involving conspiracy and the third indictment, involving conspiracy, attempt to suborn perjury, inducing another to commit perjury, and attempting to induce a witness to give false testimony, were found on January 5, 1955. The arraignment on the second and third indictments was on January 6, 1955. The District Attorney notified the defendants that the indictments would be placed on the July 1, 1958 calendar for the purpose of fixing a date for trial. Thereupon the defendants made a motion to dismiss the indictments. The court dismissed the indictments, despite the District Attorney's contention that on April 4, 1956, the defendants consented that all three cases be marked off the calendar with an understanding that they would be tried at some future time.

Judge Schweitzer, of the Court of General Sessions, after considering the facts relevant to the defendant's consent to the adjournment, concluded that (p. 263):

> "Whatever might be said as regards the several postponements up to April 4, 1956, it can scarcely be maintained that the defendants may in any way be charged with responsibility for, or acquiescence in, the long delay subsequent to that date."

This is exactly the position which we asked the New York State Court of Appeals to take in the case at bar: that whatever the responsibility of the defendant for the adjournment on October 22, 1953, or even up to January 7, 1955, when the defendant began affirmatively to seek a trial, it can scarcely be maintained that the defendant may in any way be charged with responsibility for, or acquiescence in,

the long delay subsequent to that date and until the trial was actually commenced in May of 1957.

Thus, in dismissing the indictment in the *Winter* case, the Court held (pp. 259-260):

> "On the other hand, a waiver of the right to a speedy trial is not to be lightly inferred from equivocal circumstances. The wrong and the harm that may result from undue delay in the prosecution of a criminal charge are sufficiently serious (People v. Prosser . . .) to require evidence from which a waiver or acquiescence in such delay may reasonably be inferred. Absent such evidence, we may not presume acquiescence in the loss of fundamental rights (Johnston v. Zerbst, 304 U. S. 458, 464 . . . Taylor v. United States . . . 283 F. 2d 259, 261; Petition of Provoo, D. C., 17 F. R. D. 183, affirmed 350 U. S. 857 . . .)."

In *People* v. *Piscitello* (1960), 7 N. Y. 2d 387, the defendant had sought and received no less than 20 adjournments and had consented to or acquiesced in at least 8 others. The basis for such adjournments were not only for purposes of preparing for trial and the making of motions, as in the case at bar, but also for defaults in appearance by defendant and his counsel and to permit defendant's counsel to take a month's vacation in California. Despite such facts, the New York Court of Appeals reversed the conviction of a defendant, stating at pp. 388-9:

> "No one questions that a defendant is entitled to a speedy trial (Code Crim. Pro. §668; Civil Rights Law §12; U. S. Const., 6th Amdt.), or that the burden of proceeding promptly rests on the State and not on the defendant (*People* v. *Prosser*, 309 N. Y. 353). But, such right being personal, it may be waived by conduct on the part of the defendant indicating that he is not

intent on a speedy trial, for instance, requesting a postponement or an adjournment (*People* v. *Godwin*, 2 N. Y. 2d 891; affd. 2 A. D. 2d 846), or acquiescence in a delay sought by the prosecution, or failure to make a motion before or at the trial for a dismissal by reason of such delay (*People* v. *White*, 2 N. Y. 2d 220).

"The defendant in the case before us was indicted in February, 1955 and not arraigned until July, 1956. The District Attorney, with commendable fairness, rightfully acknowledged that this delay of 17 months constituted a denial of a speedy trial to which the defendant was entitled and that, if a motion had been made at the time of the arraignment, the motion would have had to be granted. However, it is argued that the right was waived by subsequent conduct on the part of the defendant and of his counsel.

"Upon this record, it may not be said that the rights accruing to this defendant by reason of the undue delay were waived. The granting of the request by defendant's counsel for a postponement to permit the making of motions for all purposes was broad enough to indicate that any rights enjoyed by the defendant then existing were being preserved and protected. When the motion to dismiss for undue delay was made, even though subsequent in point of time to motions addressed to the indictment, it should have been granted, absent any showing of good cause to the contrary by the prosecutor (Code Crim. Prec., §668). Here there was no such showing."

We submit that similarly the conviction of Von Cseh in the case at bar should have been set aside and the indictment dismissed on the ground that he was deprived of his constitutional and statutory right to a speedy trial. The inexcusable delay of almost 30 months between the time the

prosecutor renoticed the case for trial and the time of the trial, which was caused solely by the prosecutor over the vigorous protests of Von Cseh, was unconscionable and violative of his rights and required review of the conviction herein.

The right to speedy trial is fundamentally a right guaranteed by federal and state constitutions, but it is also a statutory right in those states which in addition to the constitutional guaranty define the nature and limits of the right by express statute. Therefore, waiver or loss by one accused of crime of his right to a speedy trial includes waiver or loss not only of such right as it is guaranteed generally by federal and state constitutions but also of the rights of accused under statutes attempting to define "speedy trial" by providing for the time within which accused must be brought to trial.

The Court in *People* v. *Den Uyl* (1948), 320 Mich. 477, 31 N. W. 2d 699, points out that many states have enacted statutes providing a time limitation upon delay of trial, and these statutes are held to be supplementary to the constitutional provisions for speedy trial and enacted to give them concrete form and force; the time limit generally prescribed, with conditions as to further delay, is from 60 days to 3 terms of Court.

With reference to the importance of the constitutional guaranty of speedy trial, the Court in *ex parte Altman* (1940, D. C. Cal.), 34 F. Supp. 106 (in an opinion which did not discuss waiver or loss of such right) said:

> "We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to

bring them to trial. And yet, if the prosecutor should refuse to try them, and the Court acquiesce, they would be at his mercy. The constitutional guaranty of speedy trial (United States Constitution, Amendment VI) would be brought to nought, if, when the court set a cause for trial and the prosecutor was not prepared to proceed, the Court were powerless to dismiss it for failure to proceed diligently. To these considerations are traceable certain statutory provisions which make criminal trials within a certain time obligatory under penalty of discharge."

Generally speaking, a speedy trial is one conducted according to prevailing rules, regulations, and proceedings of law free from arbitrary vexatious, and oppressive delays. The right does not require a trial immediately upon return of an indictment, nor on arrest made under it, but requires that the trial shall be had as soon as reasonably possible after the indictment is found, without depriving the prosecution of a reasonable time in which to prepare for trial. *Shepherd* v. *United States* (1947, C. A. 8th Neb.), 163 F. 2d 974.

There is no dissent from the proposition that one may waive his constitutional or statutory right to a speedy trial, the right being a personal privilege and not of a jurisdictional nature, and not constituting any limitation upon the power of the state to prosecute.

UNITED STATES.—*Danziger* v. *United States* (1947, C. A. 9th Cal.), 161 F. 2d 299, cert. den. 322 U. S. 769, 92 L. ed. 354, 68 S. Ct. 81; *Sheppard* v. *United States* (1947, C. A. 8th Neb.), 163 F. 2d 974, *supra*; *Levine* v. *United States* (1950, C. A. 8th Mo.), 182 F. 2d 556, cert. den. 340 U. S. 921, 95 L. ed. 665, 71 S. Ct. 352; *Chinn* v. *United States* (1955, C. A. 4th W. Va.), 228 F. 2d 151; *Petition*

of Provoo (1955, D. C. Md.), 17 F. R. D. 183, aff'd 350 U. S. 857, 100 L. ed 761, 76 Ct. 101.

ARIZONA.—*Westover* v. *State* (1947), 66 Ariz. 145, 185 P. 2d 315.

CALIFORNIA.—*People* v. *Tahtinen* (1957), 150 Cal. App. 2d (Avd. 346), 309 P. 2d 497.

IDAHO.—*State* v. *Shaw* (1949), 69 Idaho 365, 207 P. 2d 540.

ILLINOIS.—*People* v. *Brame* (1955), 6 Ill. 2d 412, 128 N. E. 2d 911.

INDIANA.—*Randolph* v. *State* (1954), 234 Ind. 57, 122 N. E. 2d 860, cert. den. 350 U. S. 889, 100 L. ed. 783, 76 S. Ct. 145.

IOWA.—*Pines* v. *District Court* (1943), 233 Iowa 1284, 10 N. W. 2d, 574.

KANSAS.—*State* v. *Hess* (1956), 180 Kan. 472, 304 P. 2d 474.

MAINE.—*State* v. *Boynton* (1948), 143 Me. 313, 62 A. 2d 182.

MARYLAND.—*Harris* v. *State* (1950), 194 Md. 288, 71 A. 2d 36.

MISSOURI.—*Osborne* v. *Owsley* (1953, Mo. App.), 257 S. W. 2d 691.

NEW JERSEY.—*State* v. *Hulsizer* (1956), 42 N. J. Super 224, 126 A. 2d 47.

NEW YORK.—*People* v. *White* (1957), 2 N. Y. 2d 220, 159 N. Y. S. 2d 168, 140 N. E. 2d 258.

OKLAHOMA.—*Ex parte McCollum* (1949), 90 Okla. Crim. 153, 212 P. 2d 161.

PENNSYLVANIA.—*Commonwealth* v. *Smihal* (1956), 182 Pa. Super 232, 126 A. 2d 523.

TENNESSEE.—*State ex rel. Underwood* v. *Brown* (1951), 193 Tenn. 113, 244 S. W. 2d 168.

It has been stated as a general proposition of law that waiver of the right is effected by action or inaction on the part of defendant causing delay in prosecution, it being important to note in this connection that many of the statutes implementing the constitutional provisions for speedy trial expressly refuse the benefits thereof where the delay has happened on the application of defendant or has otherwise been occasioned by him.

UNITED STATES.—*Shepard* v. *United States* (1947, C. A. 8th Neb.), 163 F. 2d 974, *supra*; *United States ex rel. Hanson* v. *Ragen* (1948, C. A. 7th Ill.), 166 F. 2d 698, cert. den. 334 U. S. 849, 92 L. ed. 1772, 68 S. Ct. 1501; *United States* v. *Alagia* (1955, D. C. Del.), 17 F. R. D. 15.

ILLINOIS.—*People* v. *Morris* (1954), 3 Ill. 2d 437, 121 N. E. 2d 810.

IOWA.—*McCandless* v. *District Court* (1953), 245 Iowa 599, 61 N. W. 2d 674.

KANSAS.—*State* v. *Hess* (1956), 180 Kan. 472, 304 P. 2d 474.

MAINE.—*State* v. *Boynton* (1948), 143 Me. 343, 62 A. 2d 182.

MARYLAND.—*Harris* v. *State* (1950), 194 Md. 288, 71 A. 2d 36.

OKLAHOMA.—*Ex parte Meadows* (1941), 71 Okla. Crim. 353, 112 P. 2d 419.

PENNSYLVANIA.—*Commonwealth* v. *Smihal* (1956), 182 Pa. Super 232, 126 A. 2d 523.

It is now the well-established general rule, that if acts or omissions of accused are the cause of or a contributing factor in the delay which passes the trial over the period or term of Court within which, according to statute, the case must be brought to trial, unless good cause to the contrary be shown, accused is not entitled to a dismissal. *McCandless* v. *District Court* (1953), 245 Iowa 599, 61 N. W. 2d 674, *supra*. The Court said that such acts, or failure to act, when one is bound to do so, may give rise to an agreed postponement, or to a waiver of the constitutional and statutory provisions relating to a speedy trial.

Defendant can invoke his constitutional objection to a delay in bringing him to trial only if he has in no manner contributed to the delay himself. *United States* v. *Alagia* (1955, D. C. Del.), 17 F. R. D. 15.

Consequently, where delay in prosecution is caused by continuances requested by defendant or counsel in his behalf, it is generally regarded that a waiver of the right to insist upon the constitutional or statutory right in question has occurred. In fact, it has been held that the burden is on defendant to show that the delay in prosecution was not due to any act of his.

UNITED STATES.—*Gerardino* v. *Porto Rico* (1928, C. A. 1st Puerto Rico), 29 F. 2d 517; *D'Aquino* v. *United States* (1951, C. A. 9th Cal.), 192 F. 2d 338, reh. den. 203 F. 2d 390, cert. den. 343 U. S. 935, 96 L. ed. 1343, 72 S. Ct. 772, reh. den. 343 U. S. 958, 96 L. ed. 1358, 72 S. Ct. 1053; *Germany* v. *Huaspeth* (1954, C. A. 10th Kan.), 209 F. 2d 15, cert. den. 347 U. S. 946, 98 L. ed. 1094, 74 S. Ct. 644.

ARKANSAS.—*Breedlove* v. *State* (1955), 225 Ark. 170, 280 S. W. 2d 224.

CALIFORNIA.—*People* v. *Tahtinen* (1957), 150 Cal. App. 2d (Adv. 346), 309 P. 2d 497.

GEORGIA.—*Woodall* v. *State* (1920), 25 Ga. App. 8, 102 S. E. 913.

IDAHO.—*Ellenwood* v. *Cramer* (1954), 75 Idaho 338, 272 P. 2d 702, overruled on other grounds in *Schrom* v. *Cramer* (1954), 76 Idaho 1, 275 P. 2d 979.

ILLINOIS.—*People* v. *Brame* (1955), 6 Ill. 2d 412, 28 N. E. 2d 911.

INDIANA.—*Harbaugh* v. *State* (1955), 234 Ind. 420, 126 N. E. 2d 576.

KANSAS.—*State* v. *Lightfoot* (1925), 118 Kan. 428, 235 P. 843.

MISSOURI.—*State* v. *Woods* (1940), 346 Mo. 538, 142 S. W. 2d 87; *State* v. *Nolan* (1943, Mo.), 171 S. W. 2d 653.

NEW YORK.—*People* v. *Perry* (1949), 196 Misc. 922, 96 N. Y. S. 2d 517.

OKLAHOMA.—*Berkihiser* v. *State* (1950), 92 Okla. Crim. 31, 219 P. 2d 1020.

PENNSYLVANIA.—*Commonwealth ex rel. Sell* v. *Burke* (1953), 174 Pa. Super. 344, 101 A. 2d 174.

It has been held that defendant may lose the right to be discharged from prosecution under the constitutional and statutory provisions in question where the delay in prosecution resulted from the filing of dilatory pleas, motions, etc., such as motions for a bill of particulars, demurrers, motions for change of venue, or requests for additional time to enable depositions to be taken, or by the institution of habeas corpus proceedings, filing of an affidavit of prejudice against the presiding judge, etc.

UNITED STATES.—*Fowler* v. *Hunter* (1947, C. A. 10th Kan.), 164 F. 2d 668, cert. den. 333 U. S. 868, 92 L. ed. 1146, 68 S. Ct. 785; *Re Sawyer's Petition* (1956, C. A. 7th Wis.),

229 F. 2d 805, Affg. (D. C.) 129 F. Supp. 687, cert. den. 351 U. S. 966, 100 L. ed. 1486, 76 S. Ct. 1025, reh. den. 352 U. S. 860, 1 L. ed. 2d 70, 77 S. Ct. 24; *United States* v. *Postma* (1957, C. A. 2d N. Y.); 242 F. 2d 488.

ARIZONA.—*State* v. *Polan* (1954), 78 Ariz. 253, 278 P. 2d 432.

CALIFORNIA.—*People* v. *Gere* (1924, Cal. App.), 226 P. 934.

ILLINOIS.—*People* v. *Iasello* (1951), 410 Ill. 252, 102 N. E. 2d 138.

INDIANA.—*Weer* v. *State* (1941), 219 Ind. 217, 36 N. E. 2d 787, 37 N. E. 2d 537.

IOWA.—*Ferguson* v. *Beehly* (1938), 224 Iowa 1049, 277 N. W. 755.

KANSAS.—*State* v. *Stanley* (1956), 179 Kan. 613, 296 P. 2d 1088, cert. den. 352 U. S. 851, 1L. ed. 2d 62, 77 S. Ct. 73.

LOUISIANA.—*State* v. *Bradford* (1949), 217 La. 32, 45 So. 2d 897.

MONTANA.—*State ex rel. Borberg* v. *District Court* (1952), 125 Mont. 481, 240 P. 2d 854.

VIRGINIA.—*Howell* v. *Commonwealth* (1947), 186 Va. 894, 45 S. E. 2d 165.

WASHINGTON.—*State ex rel. James* v. *Superior Court* (1949), 32 Wash. 2d 451, 202 P. 2d 250; *State* v. *Lydon* (1952), 40 Wash. 2d 88, 241 P. 2d 202.

The fact that defendant is instrumental in procuring the absence of prosecution witnesses will preclude him from the benefit of a statute prescribing time of trial, as is shown in: *Re Morgan* (1929), 57 N. D. 763, 224 N. W. 209;

Respublica v. *Arnold* (1801), 3 Yeates (Pa.) 263; *Com. ex rel. Haggerty* v. *Superintendent of Philadelphia County Prison* (1869), 4 Brewst. (Pa.) 320.

Accused may not complain of the denial of a speedy trial where either he or his counsel consents to a continuance requested by the prosecution, such consent having been held equivalent to a postponement on his application from the benefits thereof.

UNITED STATES.—*Taylor* v. *United States* (1956), 99 App. D. C. 183, 238 F. 2d 259.

ARIZONA.—*Westover* v. *State* (1947), 66 Ariz. 145, 185 P. 2d 315.

ARKANSAS.—*Breedlove* v. *State* (1955), 225 Ark. 170, 280 S. W. 2d 224, *supra*.

CALIFORNIA.—*People* v. *Tahtinen* (1957), 150 Cal. App. 2d (Adv. 346), 309 P. 2d 497.

FLORIDA.—*State* v. *Williams* (1954, Fla.), 73 So. 2d 295.

GEORGIA.—*Woodall* v. *State* (1920), 25 Ga. App. 8, 102 S. E. 913.

IDAHO.—*Ellenwood* v. *Cramer* (1954), 75 Idaho 338, 272 P. 2d 702, overruled on other grounds in *Schrom* v. *Cramer* (1954), 76 Idaho 1, 275 P. 2d 979.

ILLINOIS.—*People* v. *Brame* (1955), 6 Ill. 2d 412, 28 N. E. 2d 911.

KANSAS.—*State* v. *Hess* (1956), 180 Kan. 472, 304 P. 2d 474.

IOWA.—*Keegan* v. *District Court* (1946), 237 Iowa 1186, 24 N. W. 2d 791.

MISSOURI.—*State* v. *Nolan* (1943, Mo.), 171 S. W. 2d 653.

NEW YORK.—*People* v. *Prosser* (1955), 309 N. Y. 353, 130 N. E. 2d 891, 57 ALR 2d 295 (apparently supporting the rule, but finding it unnecessary to rule directly on the matter); *People* v. *White* (1957), 2 N. Y. 2d 220, 159 N. Y. S. 2d 168, 140 N. E. 2d 258; *People* v. *Perry* (1949), 196 Misc. 922, 96 N. Y. S. 2d 517.

NORTH DAKOTA.—*State* v. *Braathen* (1950), 77 N. D. 309, 43 N. W. 2d 202.

OKLAHOMA.—*Ex parte O'Hara* (1949), 89 Okla. Crim. 250, 206 P. 2d 592.

PENNSYLVANIA.—*Commonwealth* v. *Smihal* (1956), 182 Pa. Super. 232, 126 A. 2d 523.

TENNESSEE.—*State ex rel. Underwood* v. *Brown* (1951), 193 Tenn. 113, 244 S. W. 2d 168.

From failure by defendant to object to a continuance requested by the prosecution, consent to such continuance will be presumed.

However, in *Taylor* v. *United States* (1956), 99 App. D. C. 183, 238 F. 2d 259, it was held that defendant could not be said to have acquiesced in the delay, where it appeared that although the offenses for which he was convicted were committed in July, 1950, the indictments were not returned until February, 1954, and that he had been sentenced in November, 1950, to serve a sentence of from 5 to 7½ years in prison in New York State, and remained there until, on petition of the Government filed in February, 1956, a writ of habeas corpus ad prosequendum was issued, and he was returned to the District of Columbia, arraigned in February, 1956, and convicted at a trial which commenced in March, 1956, and there was no show-

ing that he knew that he had been indicted until the writ of habeas corpus ad prosequendum was executed in 1956. The court said that there was to be borne in mind the admonition of the Supreme Court in *Johnson* v. *Zerbst* (1938), 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019, 146 ALR 357, that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that acquiescence in the loss of fundamental rights was not to be presumed.

The record must show an objection to the delay complained of, otherwise it will be presumed that the delay was with the consent of accused, thereby precluding him from complaining that he was not accorded a speedy trial.

It has been held generally that an accused is not entitled to a discharge for delay in bringing him to trial unless it appears that he resisted postponement, demanded a trial, or made some effort to procure a speedier trial than the state accorded him. So, it is ordinarily deemed that a defendant, in the absence of such effort, has waived his right to a speedy trial under the Constitution and the statutes in aid thereof.

UNITED STATES.—*Petition of Provoo* (1955, D. C. Md.), 17 F. R. D. 183, affd. 350 U. S. 857, 100 L. ed. 761, 76 S. Ct. 101, *supra*; *United States* v. *Stein* (1955, D. C. N. Y.), 18 F. R. D. 17.

ALABAMA.—*Ex parte State ex rel. Atty. Gen.* (1951), 255 Ala. 443, 52 So. 2d 158.

ARKANSAS.—*Ware* v. *State* (1925), 159 Ark. 540, 252 S. W. 934; *Williams* v. *State* (1946), 210 Ark. 402, 196 S. W. 2d 489.

CALIFORNIA.—*People* v. *Lind* (1924), 68 Cal. App. 575, 229 P. 990.

DELAWARE.—*State* v. *Tyre* (1907), 22 Del. (6 Penn.) 343, 67 A. 199.

FLORIDA.—*Kelly* v. *State* (1951, Fla.), 54 So. 2d 431.

ILLINOIS.—*People* v. *Sweeney* (1951), 409 Ill. 223, 99 N. E. 2d 143.

IOWA.—*McCandless* v. *District Court* (1953), 245 Iowa 599, 61 N. W. 2d 674, *supra*.

KANSAS.—*Re Garner* (1931), 134 Kan. 410, 5 P. 2d 821.

LOUISIANA.—*State* v. *Banks* (1903), 111 La. 22, 35 So. 370.

MAINE.—*State* v. *Boynton* (1948), 143 Me. 313, 62 A. 2d 182, *supra*.

MARYLAND.—*Tutt* v. *Warden, Maryland Penitentiary* (1952), 199 Md. 691, 87 A. 2d 523.

MICHIGAN.—*People* v. *Foster* (1933), 261 Mich. 247, 246 N. W. 60.

MINNESOTA.—*State* v. *McTague* (1927), 173 Minn. 153, 216 N. W. 787.

MONTANA.—*State* v. *Schnell* (1939), 107 Mont. 579, 88 P. 2d 19.

NEBRASKA.—*Maher* v. *State* (1944), 144 Neb. 463, 13 N. W. 2d 641, cert. den. 323 U. S. 737, 89 L. ed. 606, 65 S. Ct. 91.

NEVADA.—*Re Tramner* (1912), 35 Nev. 56, 126 P. 337, 41 L. R. A. N. S. 1095.

NEW JERSEY.—*State* v. *Halsey* (1956), 42 N. J. Super. 224, 126 A. 2d 47.

NORTH DAKOTA.—*State* v. *Dancer* (1924), 51 N. D. 98, 199 N. W. 196.

OHIO.—*Ex parte McGehan* (1872), 22 Ohio St. 442.

PENNSYLVANIA.—*Commonwealth* v. *Smikal* (1956), 182 Pa. Super. 232, 126 A. 2d 523.

SOUTH DAKOTA.—*State* v. *Lamphere* (1965), 26 S. D. 98, 104 N. W. 1038.

TENNESSEE.—*State ex rel. Underwood* v. *Brown* (1951), 193 Tenn. 113, 244 S. W. 2d 168.

TEXAS.—*Gass* v. *State* (1955), 161 Tex. Crim. 37, 274 S. W. 2d 697.

UTAH.—*State* v. *Bohn* (1926), 67 Utah 362, 248 P. 119.

WASHINGTON.—*State* v. *Landon* (1952), 40 Wash. 2d 88, 241 P. 2d 202.

WISCONSIN.—*State* v. *Sawyer* (1953), 263 Wis. 218, 56 N. W. 2d 811, cert. dismd. 346 U. S. 801, 98 L. ed. 333, 74 S. Ct. 66.

WYOMING.—*Casper* v. *Wagner* (1955), 74 Wyo. 115, 284 P. 2d 409.

In England, from the very earliest time, a prisoner, in theory at least, enjoyed the right to a speedy trial which was procured him by the commission of jail delivery, which issued to the justices of assize, and twice every year resulted in the jails being cleared and the prisoners confined therein being convicted and punished or freed from custody.

The right to a speedy trial is guaranteed by constitutional and statutory provisions. The right is not subject to judicial discretion. The Sixth Amendment to the Federal Constitution guarantees to accused in a criminal prosecution under the Federal Law the right to a speedy trial. While this provision does not generally apply to criminal prosecutions in the State courts under State laws, the right is generally guaranteed by State Constitutional or State statutory provisions. Any act of the legislature which in-

fringes a Constitutional provision providing for the speedy trial of a person accused is necessarily nugatory. The right to a speedy trial is absolute [Ill.—*People* v. *Schmagien*, 198 N. E. 142, 361 Ill. 371; *People* v. *Szobor*, 195 N. E. 648, 360 Ill. 233], and is not subject to the discretionary power of the Courts [*De La Mar* v. *Superior Court*, San Francisco, 71 P. 2d 96, 22 Cal. App. 2d 373; *State* v. *Artz*, 191 N. W. 605, 154 Minn. 290; *State* v. *Clark*, 168 P. 944, 86 Or. 464; *State* v. *Bond*, 271 S. W. 379, 114 Tex. 468], and is of such substantiality that no technical objection to the procedure whereby relief is sought should preclude its being enforced [*United States ex rel., Coleman* v. *Cox*, C. C. A. Miss., 47 F. 2d 988].

The constitutional guarantees of the right of a speedy trial extend to all persons accused of criminal offenses. Incarceration is not essential to its operation; an accused admitted to bail is protected as well as one in prison, as is also one who has been indicted, but not arrested, and who is not avoiding arrest.

A speedy trial is, in general, one had as soon as the prosecution, with reasonable diligence, can prepare for it; a trial according to fixed rules, free from capricious and oppressive delays, but the time within which it must be had to satisfy the guaranty depends on the circumstances.

No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; it is consistent with delays, and whether such a trial is afforded must be determined in the light of the circumstances of each particular case as a matter of judicial discretion. It is generally said that a speedy trial is one had as soon after indictment as the prosecution can with reasonable diligence prepare for it, regard being had to the terms of court, a trial conducted according to fixed rules, regulations

and proceedings of law, free from vexatious, capricious, and oppressive delays. One accused of crime is not entitled to a trial immediately on his arrest or accusation, he must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented if the case is one wherein the trial is on indictment, and until the prosecution has had a reasonable time to prepare for the trial. Further, his right is not infringed by continuances in the discretion of the presiding judge, unless such discretion is arbitrarily exercised. However, an unreasonable delay arising from the negligence or laches of the prosecution without fault or consent by accused violates the guarantee of a speedy trial.

The term "speedy", as employed in the constitutional provisions under consideration, being a word of indeterminate meaning, permits legislative definition to some extent; and the authorities generally hold that statutes providing for a discharge of accused unless trial is had within a stated time after indictment, information or commitment, or which require an indictment or information within a stated time, are enacted for the purpose of enforcing the constitutional right, and that they constitute a legislative construction or definition of the constitutional provision, and must be construed fairly to the accomplishment of that end.

The accused is entitled to a discharge or dismissal if his right to a speedy trial is violated and statutes providing for discharge or dismissal if the accused is not tried within a stated time are mandatory.

Constitutional guaranties of the right of accused to a speedy trial are self-executing, and if his right is violated accused is entitled to be discharged or to have the proceedings dismissed. Further, under the express provisions of the statutes in some jurisdictions, in case accused is not

tried within the period of time specified by the statutes and if according to some of such provisions he has been committed and not admitted to bail, and there has been a demand for trial, he is entitled to discharge or a dismissal of the proceedings.

Statutes which in express terms provide for a discharge or dismissal in case trial is not had within a stated time are, as a rule, construed to be mandatory, although there is some contrary authority, and unless the delay is caused by accused, or has been on good cause, accused, if he shows that he comes within the provisions of the statutes, he must be discharged. However, a statute which does not expressly provide for discharge or dismissal if not complied with has been construed as merely directory.

One, to be entitled to a speedy trial, must come within the scope of the constitutional or statutory guaranty. It is not duty of defendant to press that he be prosecuted upon indictment under penalty of waiving his right to speedy trial if he fails to do so. *U. S.* v. *Dillon*, D. C. N. Y. 1958, 183 F. Supp. 541.

Even assuming that, as general rule, a demand must be made for a speedy rule, an exception must be made in favor of one who is in fact powerless to take this action. *U. S.* v. *Chase*, D. C. Ill. 1955, 135 F. Supp. 230.

Whether delay in completing a prosecution amounts to an unconstitutional deprivation of right to speedy trial depends on circumstances, and the delay must not be purposeful or oppressive. *Pollard* v. *U. S.*, Minn. 1957, 77 S. Ct. 481, 352 U. S. 354, 1 L. Ed. 2d 393.

The right of a speedy trial is relative and is consistent with delays and dependent upon circumstances. *Stevenson* v. *U. S.*, C. A. 1960, 278 F. 2d 278, 107 U. S. App. D. C. 398.

The number of years, having elapsed since commission of offense is an important, but not conclusive, criterion in determining whether defendant has been deprived of his constitutional right to speedy trial. *Foats* v. *U. S.*, C. A. Ohio 1958, 253 F. 2d 215.

Provisions of the Sixth Amendment guaranteeing a speedy trial to anyone charged with an offense contemplates a pending charge and not the mere possibility of a criminal charge and, therefore, a defendant's right to a speedy trial could not be deemed violated on theory government did not commence its prosecution against a defendant until about three years after crimes in question were allegedly committed. *Parker* v. *U. S.*, C. A. Tenn. 1958, 252 F. 2d 680, cert. den. 78 S. Ct. 1003, 355 U. S. 964, 2 L. Ed. 2d 1071.

Where more than seven years passed between time of arrest and time of trial, including some four and one-half years between time of indictment and time of trial, but indictment was found within period of limitations, and no effort was shown to have been made by defendant to speed the trial, and no prejudice was shown to have resulted to defendant because of delay, and no motion was made by defendant at beginning of trial for dismissal because of delay, defendant on appeal could not successfully attack judgment of conviction on ground that there had been a failure to provide a speedy trial as guaranteed by this amendment. *U. S.* v. *Kao*, C. A. N. Y. 1958, 251 F. 2d 47, cert. den. 78 S. Ct. 702, 356 U. S. 949, 2 L. Ed. 2d 714.

Failure to bring defendant to trial until 1956, for housebreaking and robbery allegedly committed in 1950, was a denial of constitutional right to speedy trial and required reversal in view of weakness of evidence, though delay was caused by imprisonment of defendant in New York for another offense, in absence of showing of reasonable effort

by government to obtain defendant's return for trial. *Taylor* v. *U. S.*, C. A. 1956, 238 F. 2d 259, 99 U. S. App. D. C. 183, *supra.*

Right to a speedy trial is relative and must be determined in light of all circumstances in each case. *Day* v. *Davis*, C. A. Kan. 1956, 235 F. 2d 379, cert. den. 77 S. Ct. 104, 352 U. S. 881, 1 L. Ed. 2d 81, rehearing denied 77 S. Ct. 152, 352 U. S. 913, 1 L. Ed. 2d 120.

The constitutional guarantee of a speedy trial is a personal right, which may be waived by failure to assert it. *Campodonico* v. *U. S.*, C. A. Cal. 1955, 222 F. 2d 310, cert. den. 76 S. Ct. 65, 350 U. S. 831, 100 L. Ed. 742; *U. S.* v. *Stein*, D. C. N. Y. 1955, 18 F. R. D. 17.

The constitutional right of an accused to a speedy trial must be considered with regard to the practical administration of justice, and such right does not preclude the rights of public justice. *Kyle* v. *U. S.*, C. A. Or. 1954, 211 F. 2d 912.

One whose own action delays trial on criminal charge is precluded from invoking his right under this amendment to a speedy trial. *U. S. ex rel. Hanson* v. *Ragen*, C. C. A. Ill. 1948, 166 F. 2d 608, cert. den. 68 S. Ct. 1501, 334 U. S. 849, 92 L. Ed. 1772.

It is duty of public prosecutor, not only to prosecute those charged with crime, but also to observe constitutional mandate guaranteeing speedy trial. *U. S.* v. *Dillon*, D. C. N. Y. 1960, 183 F. Supp. 541, *supra.*

It is basic concept of our system of justice, articulated and made secure by this amendment, that a fair and impartial trial is impossible after a long lapse of time *U. S.* v. *Chase*, D. C. Ill. 1955, 135 F. Supp. 230.

The right to a speedy trial guaranteed by this amendment is not an unqualified privilege to demand immediate trial in all cases, but the defendant under his demand is

entitled to speedy settlement of the charges made against him under the circumstances. *U. S.* v. *Pack*, D. C. Del. 1957, 20 F. R. D. 209, appeal dismissed, 247 F. 2d 168.

Accused's contention that she had not been given her constitutional right entitling her to immediate discharge because of failure on part of state to accord her a speedy trial, which was raised at trial, but which was not raised on appeal, would not be considered on an appeal. *Scott* v. *State*, 1955, 113 A. 2d 880, 10 Terry 251, cause remanded on reargument, 117 A. 2d 831, 10 Terry 401.

The "speedy trial" guaranteed under this amendment and McKinney's N. Y. Code Cr. Proc. §8 is intended to protect the accused if held in jail to await trial against prolonged imprisonment, and to relieve him of anxiety and public suspicion attended upon an untried accusation of crime. *People* v. *Kraemer* (1958), 177 N. Y. S. 2d 425, 14 Misc. 2d 42.

Granting a request by defendant's counsel for postponement to permit making of motion for all purposes was broad enough to indicate that any rights enjoyed by defendant then existing were being preserved and protected, and since there was no showing to contrary, motion to dismiss for undue seventeen month delay between indictment and arraignment should have been granted even though it was made subsequent in point of time to motion addressed to indictment. *People* v. *Piscitello* (1960), 165 N. E. 2d 849, 7 N. Y. 2d 387, 198 N. Y. S. 2d 273.

A "speedy trial" is one according to fixed rules, free from capricious and oppressive delays held as soon as prosecution, with reasonable diligence, can prepare for trial, the time within which it must be held to satisfy guaranties of Const. Ind. art. 1, § 12 and the Sixth Amendment depending on the circumstances. *State* v. *Beckwith*, 1944, 57 N. E. 2d 193, 222 Ind. 618.

The right to a speedy trial is necessarily relative, due allowance being made for delays which are a natural incident to every criminal prosecution and are regarded as reasonable. *Id.*

Persons accused of crime are entitled not only to a trial by an impartial jury, but to a speedy trial. *Harris* v. *State*, 1951, 65 S. E. 2d 367, 84 Ga. App. 1.

Constitutional guaranty of speedy trial in criminal cases is not inflexibly mandatory and does not apply rigidly to every instance of delay in a criminal case but only to vexatious, capricious and oppressive delays, manufactured by the ministers of justice. *Leggett* v. *Kirby*, Ark. 1960, 331 S. W. 2d 267, cert. den., 80 S. Ct. 1073, 362 U. S. 981, 4 L. Ed. 2d 1018.

The right to a speedy trial is of long standing and has been jealously guarded over the centuries. Magna Carta states:

> "To no one will we sell, to no one deny or delay, right or justice."

This provision was implemented by special writs or jail delivery, and later by commissions of general jail delivery, under which special judges cleared the jails twice a year. In 1679 Parliament passed the Habeas Corpus Act, 31 Car. II, ch. 2, which required that prisoners indicted for treason or felony be tried at the next sessions or released on bail, "unless it appear to the Judges and Justices upon Oath made, that the Witnesses for the King could not be produced the same Term, Sessions, or General Gaol Delivery; (2) and if any Person or Persons committed as aforesaid upon his Prayer or Petition in open Court the first Week of the Term or first Day of the Sessions * * *, to be brought to his Trial, shall not be indicted and tried the second Term, Sessions * * * or General Gaol-delivery, after his

commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment." That Act, which Blackstone called "the Bulwark of the British Constitution", was still cherished by the British people at the time our Constitution was adopted, and by American patriots and lawyers, nurtured on Blackstone. Some thought the right to speedy trial and similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary. But the American people wanted to be sure, and gave the right of speedy trial first place in the Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Congress did not pass any statute defining the term "speedy trial", and research discloses no early federal case construing it. But most of the states which ratified the first ten amendments included a provision for speedy trial in their constitutions, and either adopted the British Habeas Corpus Act itself, or passed a similar act. These acts and the decisions of state courts during the next generation throw some light on what the men who adopted and ratified the Sixth Amendment meant by the term "speedy trial".

In *Frankel* v. *Woodrough*, 8 Cir. 1925, 7 F. 2d 796, 798, the following dictum appears:

> "The Constitutions of most of the states have provisions similar to the Sixth Amendment and many of

> the states have statutory definitions of the time or number of court terms within which criminal accusations must be tried. Such statutes provide usually for the discharge of the accused unless the trial is within the limits so defined. The United States has no such statutory provisions and we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution. His right and only remedy would be to apply to the proper appellate court for a writ of mandamus to compel trial."

This dictum has been repeated in a number of later cases, although in the great majority of federal cases before and after *Frankel* v. *Woodrough* the court recognized expressly or impliedly that if a defendant does not waive his rights by failing to ask for a speedy trial, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial. Even in the later Eighth Circuit cases the court recognized the right to release in a proper case.

In *Ex parte Altman*, D. C. S. D. Cal. 1940, 34 F. Supp. 106, 108, *supra*, Judge Yankwich said:

> "* * * it is not questioned that the Court, in the exercise of its jurisdiction, has the inherent power to order a dismissal for failure to prosecute. * * *
>
> We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring them to trial. And yet, if the prosecutor should refuse to try them, and the court acquiesce, they would be at his mercy. The constitutional guaranty of speedy trial (United States Constitution, Amendment VI)

> would be brought to nought, if, when the court set a case for trial and the prosecutor was not prepared to proceed, the Court were powerless to dismiss it for failure to proceed diligently."

The dictum in *Frankel* v. *Woodrough* was based upon the fact that there was no statutory provision directing a discharge. In 1944, the Supreme Court adopted the Federal Rules of Criminal Procedure. Rule 48 deals with "Dismissal"; subdivision (b) of that rule is as follows:

> "(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The federal courts and the state courts of Alabama hold that it is incumbent upon a defendant to demand a speedy trial, and a majority of the other state courts are in accord with this view. Since the constitutional provisions on this point in all the states are substantially the same, the different views arise from the courts' interpretations of the various constitutional provisions and the statutes which are supplementary to these provisions.

What constitutes an unreasonable delay in a trial is a matter in the court's discretion, depending on the circumstances of the individual case. Of course, the trial must not be "too speedy," in that the accused does not have sufficient time to prepare for his defense. It seems that there must be a "happy medium" reached before the trial is considered sufficient for all parties concerned. Although the matter as to what constitutes a speedy trial is within the court's discretion or subject to statute, the right to a "speedy trial" is

absolute and not within the court's discretion. *People* v. *Szobor*, 360 Ill. 233, 195 N. E. 648 (1935).

The federal courts also follow the majority rule of *Lee* v. *Grayson*, 99 So. 2d 555 (Fla. 1957).

A convincing minority follows the view that the burden of seeing that the accused has a speedy trial rests upon the state, which has vast legal machinery, rather than upon the accused who is obviously more limited. The minority view finds precedent in early English common law. In England, twice each year all prisoners who had not been tried were tried, and were sentenced or released. 22 C. J. S., Criminal Law, §466 (1940). All of this was apparently done without the accused having to "beg" for his trial. This seems to indicate that the burden of seeing that a speedy trial takes place was upon the government and not the accused.

An Arizona decision, in accord with the minority view, held that it was immaterial that the accused was out on bail pending the trial; the accused was entitled to a speedy trial in jail or out. *State* v. *Carrillo*, 41 Ariz. 170, 16 P. 2d 965 (1932). The Arizona Court, in its interpretation of that state Constitution, sums up the minority rule as follows:

> "As we read the law, defendant is not required to request the trial. He is not the moving party. It is the state that initiates the accusation, and any delay in its prosecution, except for most cogent reasons, is not contemplated or justifiable. If the state can excuse itself for not bringing the accused to trial because he did not request the trial, then the onus for celerity is shifted to the accused. There is no intimation in the law that the accused must request a trial before he may claim the right to be dismissed for failure on the part of the state to bring on the prosecution within the limit fixed by law. If the trial is postponed for any reason other than some cause attributable to the accused, in

> the absence of a showing of good cause for the postponement, it must be dismissed."

The guarantee of a speedy trial—embodied in the United States Constitution and in the constitutions of many states, is found in 8 of the New York Code of Criminal Procedure. In so many words, that section announces that:

> "In a criminal action the defendant is entitled . . . to a speedy and public trial."

Section 668 of that Code, providing the means by which the defendant may enforce his right, declares:

> "If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown."

The speedy trial guarantee, preventing undue delay between the time of indictment and trial, serves a three-fold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and, finally, like statutes of limitation, it prevents him from being "exposed to the hazard of a trial, after so great a lapse of time" that "the means of proving his innocence may not be within his reach", as, for instance, by the loss of witnesses or the dulling of memory. Report of Commissioners on Practice and Pleading (1849), p. 342, quoted in McKinney's Consol. Laws of New York, Book 66, Pt. 2, Code Crim. Proc. (1945 Ed.), p. 553.

Its benefits may be claimed, therefore, by any person under indictment, whether he be imprisoned to await trial on the pending charge, whether he be admitted to bail or whether he be a prisoner already serving a sentence in the same jurisdiction for a different crime. See e.g., *People v. Corrado*, 150 Misc. 787, 789-790, 270 N. Y. S. 235, 237, 239; *Frankel* v. *Woodrough*, 8 Cir., 7 F. 2d 796, 798-799; *Fulton* v. *State*, 178 Ark. 841, 843-845, 12 S. W. 2d 777; *Harris* v. *State*, 194 Md. 288, 296, 71 A. 2d 36; *State* v. *Smith*, 10 N. J. 84, 93, 89 A. 2d 404; *Arrowsmith* v. *State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363; *Ex parte Chalfant*, 81 W. Va. 93, 93 S. E. 1032; *State* v. *Keefe*, 17 Wyo. 227, 257-259, 98 P. 122, 22 L. R. A., N. S. 896.

Although a number of jurisdictions have implementing provisions similar to §668 of the New York Code of Criminal Procedure, the results reached by their courts have not been uniform. In some states, it has been said that, if the defendant does not affirmatively and promptly make known his desire for a speedy trial, he may not be heard to complain. See, e.g., *Pietch* v. *U. S.*, 10 Cir., 110 F. 2d 817, 819, 129 A. L. R. 563. In other states, the courts have taken a different view: the burden of proceeding promptly is on the state, not on the defendant. See, e.g., *State* v. *Carrillo*, 41 Ariz. 170, *supra; State* v. *Chadwick*, 150 Or. 645, 650; *Flanary* v. *Commonwealth*, 184 Va. 204, 35 S. E. 2d 135; *Ex parte Chalfant*, *supra*.

In short, then, since there was an untoward delay of four years, without a waiver by petitioner of his section 8 right to a speedy trial, and since the prosecution failed to show the slightest "good cause" for that delay, the trial judge should have granted defendant's motion and dismissed the indictment.

As Judge Fuld stated in *State* v. *Prosser*, 309 N. Y. 353, 130 N. E. 2d 891, 57 A. L. R. 2d 295:

"It may well be that adherence to the rule here announced will on occasion result in the discharge of one guilty of crime, but, as to that, we need but say, * * * that our decision 'transcends the issues of * * * [a particular defendant's] guilt or the disposition of [a] particular case'".

In *People* v. *Wilson* (Law Report News, December 12, 1968, page 2 otherwise unreported), the New York State Court of Appeals in reversing a judgment (30 A. D. 2d 297, 298 N. Y. S. 2d 792), and dismissing an indictment held, as follows:

"* * * The Presiding Justice wrote that it was unnecessary to decide 'whether the right to a speedy trial is such a fundamental principle of liberty and justice as to come within the due process clause' of the Fourteenth Amendment of the Federal Constitution. * * * He agreed that unreasonable delay in criminal prosecutions should not be tolerated. But, referring to the question as a new one in the New York courts, he concluded that the Legislature by a series of statutes had produced a complete system whereby a pending criminal prosecution may be dismissed for delay. * * * The Appellate Division's decision was that the subsequent prosecution of appellant had been authorized by these statutes and that the statutes so read are not unconstitutional.

"It is true, as the Appellate Division stated, that our statutes on their face permit the result arrived at here and that in other States statutes similar to our section 673 have been held not to be denials of speedy trial rights. But each establishes its own standards of due process. New York State's official formulation of the right of a defendant to a prompt trial is expressed in the statutes listed in the Appellate Division

opinion but this group of statutes must not be so read as to defeat the fundamental right of an accused citizen to be brought to trial and to be given a fair opportunity to show his innocence. I think these statutes must be so applied as to carry out the spirit and purpose expressed in *People* v. *Prosser* (309 N. Y. 353, *supra*). They have not been so applied here."

"Section 8 of our Code of Criminal Procedure and section 12 of the Civil Rights Law list a 'speedy and public trial' as one of the rights of a defendant in a criminal trial. This affirmation, as our *Prosser* opinion (*supra*) points out, is no less a guarantee because not written into our State Constitution. The method of enforcement of the right is described in section 668 of the Code of Criminal Procedure under which this defendant won his dismissal; and which directs a dismissal on defendant's motion if the defendant 'be not brought to trial at the next term of the court in which the indictment is triable' and no good cause is shown for the delay. * * * Everyone now agrees that the right to a prompt trial is a fundamental one. The State of New York does not present a fundamental right with one hand, and take it away with the other. As Judge Fuld wrote in *People* v. *Prosser* (309 N. Y. 353, 356, *supra*): 'The speedy trial guarantee, preventing undue delay between the time of indictment and trial, serves a threefold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and, finally, like statutes of limitation, it prevents him from being "exposed to the hazard of a trial, after so great a lapse of time" that "the means of proving his innocence may not be within his reach"—as, for instance by the loss of witnesses or the dulling of memory.' * * *

> "As in the *Prosser* case, we realize that 'adherence to the rule' may 'on occasion result in the discharge of one guilty of crime' but we point out again that the result of those decisions 'is merely to impose upon the officers, charged with enforcing the law and who secured the indictment, the quite reasonable, far from burdensome, duty of noticing it for trial' (*Prosser* opinion, 309 N. Y., at p. 351, *supra*)."

Since the foregoing decisions of the several states are in conflict with one another, it is incumbent upon this Court to resolve this conflict to create a consistent rule or yardstick. The case at bar is deemed so important and epitomizes the myriad problems which beset the field of "speedy trial" deprivations. This Court has never precisely set forth the basis upon which the federal tribunals predicate their interpretation of the constitutional and statutory right to a speedy trial. In the absence of a Congressional enactment, an unequivocal explanation by this Court to clarify and justify this apparent conflict would be salutary; therefore, this Court should assume jurisdiction and grant the writ of certiorari.

Certiorari is sought on the grounds that the New York Court of Appeals has rendered a decision on an important question of State and Federal Law in conflict with applicable decisions and controlling case law; has decided an important question of State and Federal law which should be clarified and made more definite and certain by this Court; has decided a Federal question of substance not theretofore determined by this Court; has decided said question in a way probably not in accord with the applicable decisions of this Court and with other States and Circuits; and/or because of the importance of the question for the administration of criminal justice in the State and Federal Courts.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED FOR THE REASONS RELIED ON HEREINBEFORE.

Respectfully submitted,

FRANCES KAHN
Member of the Bar
of the Supreme Court
of the United States
Attorney for Petitioner
401 Broadway
New York 13, New York

APPENDIX A

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of October A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent-Appellant,

—v.—

LOUIS VON CSEH,
Appellant-Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the defendant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

"Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz: Defendant contended that the right to a speedy trial as guaranteed

by the Constitution of the United States was denied to him. The Court of Appeals held that there was no such denial and that there was no substance or merit to defendant's contentions."

AND the Court of General Sessions, County of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

GEARON KIMBALL
Deputy Clerk

Order on Remittitur

At a Term of the Court of General Sessions of the County of New York, held at the Criminal Courts Building, in the City of New York, Borough of Manhattan, on the 17th day of August, 1960.

Present:

HONORABLE IRWIN D. DAVIDSON,
Judge of the Court of General Sessions.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant-Respondent

—against—

LOUIS VOX CSEH,

Defendant-Respondent-Appellant

WHEREAS, heretofore, to wit: at a term of the Court of General Sessions of the County of New York, held at the Criminal Courts Building, in the Borough of Manhattan, of said City, on the 27th day of June, 1957, the above-named defendant-respondent-appellant was in due form of law convicted by the verdict of a jury of certain felonies, to wit: 25 counts of grand larceny in the first degree and 4 counts of forgery in the second degree whereupon, to wit, on the 18th day of November then next ensuing, it was considered by the said Court and ordered and adjudged, that said defendant-respondent-appellant, for the felonies aforesaid whereof he was convicted as aforesaid, be imprisoned

in the State Prison at hard labor for the term of not less than two years nor more than four years upon each of twenty-four counts of grand larceny in the first degree, said sentences to be served concurrently; sentence upon his conviction on one count of the crime of grand larceny in the first degree was suspended; and, upon his conviction on the remaining four counts of forgery in the second degree he was sentenced to imprisonment for not less than two nor more than four years, said sentences to be served concurrently with each other and with the sentences imposed upon his conviction upon each of the twenty-four counts of grand larceny in the first degree;

And whereas, the defendant-respondent-appellant aforesaid thereafter duly appealed from the said judgment to the Appellate Division of the Supreme Court of the State of New York for the First Department;

And whereas, at a Term of the Appellate Division of the Supreme Court, held in and for the First Department, to wit; at the Court House thereof in the County of New York, on the 16th day of December, 1959, said judgment of this Court was by the judgment of said Appellate Division modified by reversing, on the law, the convictions on all larceny counts (counts 1 through 25) and, in the exercise of discretion, such counts being dismissed and the suspended or concurrent sentences imposed thereunder vacated, and as so modified the judgment of conviction was unanimously affirmed on the law and the facts;

And whereas, the defendant-respondent-appellant and the appellant-respondent aforesaid thereafter duly appealed from the judgment of said Appellate Division to the Court of Appeals of the State of New York;

AND WHEREAS, at a term of said Court of Appeals, held at the Capitol in the City of Albany, on the 8th day of July, 1960, the said judgment of said Appellate Division was by the judgment of said Court of Appeals in all things affirmed, and the record herein and the proceedings in the said last-mentioned Court upon the said appeal, were by the said judgment remitted to this Court, there to be proceeded upon according to law, as by the remittitur of said Court of Appeals now on file in this Court, more fully appears;

AND WHEREAS, the defendant-respondent-appellant Louis Von Cseh has been at liberty under bond upon a Certificate of Reasonable Doubt pending the disposition of the appeal aforesaid, and the District Attorney having moved on the bail bond that the said defendant-respondent-appellant Louis Von Cseh be surrendered in execution of the said judgment and the defendant-respondent-appellant Louis Von Cseh having surrendered himself for the execution of the said judgment;

NOW, THEREFORE, on reading and filing the said remittitur, and on motion of Frank S. Hogan, District Attorney, it is

ORDERED, that said judgment of said Court of Appeals be and the same hereby is made the judgment of this Court, and it is further

ORDERED, that said judgment of this Court so appealed from as aforesaid and so modified, and said judgment of the Appellate Division of the Supreme Court herein, be and the same are hereby directed to be enforced and carried into execution and effect, and it is further

ORDERED that the Commissioner of Correction of the City of New York receive the said defendant-respondent-appellant Louis Von Cseh and deliver him to the Warden of the State Prison and the said Warden is hereby ordered to receive the said Louis Von Cseh from the Commissioner of Correction and keep and detain the said Louis Von Cseh in the said State Prison upon a commitment and sentence of June 27, 1957, imposed by the Honorable Irwin D. Davidson, a Judge of the Court of General Sessions of the County of New York, as modified as hereinbefore set forth, to wit, four (4) terms of imprisonment in State Prison each for a period of not less than two (2) years nor more than four (4) years under counts 26, 28, 29 and 31 (forgery counts), each of said terms to be served concurrently with each other.

Enter,

IRWIN D. DAVIDSON
Judge of the Court of General Sessions

October 13, 1960

And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following:

"Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz: Defendant contended that the right to a speedy trial as guaranteed by the Constitution of the United States was denied to him. The Court of Appeals held that there was no such denial and that there was no substance or merit to defendant's contentions."

And it was also further ordered that the record aforesaid and the proceedings in this Court, be remitted to the Court of General Sessions of the County of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order and judgment be affirmed &c as aforesaid.

And thereupon, as well the notices of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of General Sessions of the County of New York, before the Judges thereof, according to the form and of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of General Sessions, before the Judges thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

[Certified by Clerk of Court of Appeals]

APPENDIX B

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of October A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 532

THE PEOPLE &c.,

Respondent-Appellant,

vs.

LOUIS VON CSEH,

Appellant-Respondent.

A motion for a reargument of the above cause and for other specified relief having been heretofore made upon the part of the defendant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

GEARON KIMBALL
Deputy Clerk

[SEAL]

APPENDIX C

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

Oct. 20, 1959.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

LOUIS VON CSEH,

Defendant-Appellant.

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191 N. Y. S. 2d 699, 9 A. D. 2d 660.
See also 9 Misc. 2d 718, 170 N. Y. S. 2d 699.

Before BOTEIN, P.J., and BREITEL, RABIN, FRANK and MCNALLY, JJ.

PER CURIAM.

Judgment of conviction modified by reversing, on the law, all larceny counts (counts 1 through 25) and, in the exercise of discretion, such counts are dismissed and the suspended or concurrent sentences imposed thereunder eliminated, and as so modified the judgment of conviction is unanimously affirmed on the law and the facts. The larceny convictions may not stand because defendant made use of false representations (i.e., the "padded" invoices) "in the course of accomplishing, or in aid of, or in facilitating" the theft within the meaning of Section 1290-a of the Penal Law. Even if the false pretenses were used in connection with a scheme which aborted prior to the

commission of the larcenies alleged, the only material deviations from such scheme was defendant's unilateral ouster of his colleagues. Thus, the false representations constituted an integral part of the embezzlement eventually committed and were adopted by defendant in order to accomplish the crime charged. See *People* v. *Lobel*, 298 N. Y. 243, 82 N. E. 2d 145, esp. diss. op. by Fuld, J., and Penal Law, §1290-a, as amended by L. 1950, c. 149. Since the larceny counts contained no allegations of any false representations, proof of them was inadmissible to sustain the larceny counts. In view of the foregoing, no determination need be made whether defendant's other contentions with respect to such larceny counts have merit and were preserved by exceptions to the charge. It is noted, however, on this record and its limited proof, that in view of the broad authority given by Man Radio to defendant and his colleagues under the agreement between Man Radio and Man Investors (e.g., the right to deposit Man Radio's funds in such manner as they saw fit), an objective manifestation of dominion inconsistent with Man Radio's authorization was required before the funds could be deemed stolen. Neither the secret accumulation of Man Radio's funds at Indus nor their subsequent transfer to defendant's personal account necessarily constituted such inconsistent dominion. Hence, the evidence supports the jury's finding that defendant committed the larcenies, as alleged, when he took down the funds from his personal account and used them himself. Similarly, therefore, there was no error in the court's refusal to grant defendant's third request. With respect to the forgery counts (i.e., counts 26, 28, 29 and 31), the evidence amply supported the jury's finding of guilt; Section 1290-a was inapplicable and therefore did not inhibit the admission of proof of the "padded" invoices; and, contrary to defendant's request to charge, Mathur was not an accomplice as a matter of

law in these later crimes committed by defendant individually. In view of the affirmance of the forgery convictions and the concurrent sentences imposed, the larceny counts may be dismissed, in the exercise of discretion, since no useful purpose would be served by a new trial thereon (Code Cr. Proc. §543; *People* v. *Daghita*, 301 N. Y. 223, 228, 93 N. E. 2d 649, 651. See *People ex rel. Maurer* v. *Jackson*, 2 N. Y. 2d 259, 269, 159 N. Y. S. 2d 203, 210; cf. *People* v. *Torres*, 5 A. D. 2d 134, 170 N. Y. S. 2d 104).

Settle order.